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In The

Supreme Court of the United States

October Term, 1969
No. 350

J. WILLISON SMITH, JR. and
ELIZABETH K. SMITH, His Wife,
Petitioners

v.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION

and

PHILADELPHIA ELECTRIC COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on April 23, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Chancellor of the Court of Common Pleas of Dauphin County (R. 113a) sitting as the Commonwealth Court is reported in 85 Dauph. 106 (1966) and is printed in Appendix B hereto, infra, p. 24. The opinion of the Court en Banc of the Court of Common Pleas of Dauphin County (R. 145a) dismissing Petitioners' exceptions is reported in 86 Dauph. 376 (1966), and is printed in Appendix B hereto, infra, p. 42. The opinion of the Supreme Court of Pennsylvania, printed in Appendix B hereto, infra, p. 54, is reported in 434 Pa. 41, 252 A. 2d 589.

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on April 23, 1969, p. 60, infra, argument thereon having been originally heard May 23, 1967, in Harrisburg, Pennsylvania and reargument thereon having been heard January 22, 1969 in Philadelphia, Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The federal question sought to be reviewed of the jurisdiction over interstate high voltage electric transmission facilities as being solely within the jurisdiction of the Federal Power Commission was raised at the commencement of the first hearing on the merits, August 17, 1965 (R. 36a) in the following language:

"The first (question) is, does the Federal Power Commission have sole jurisdiction over the transmission of electric energy in interstate commerce and related to that question is whether Pennsylvania Public Utility Commission, in view thereof, can possibly have jurisdiction if it is vested in the Federal Power Commission."

QUESTION PRESENTED

Whether the Federal Power Commission has sole and exclusive jurisdiction over a high voltage interstate electrical transmission line, including the construction thereof, as a facility used in interstate commerce?

STATUTE INVOLVED

The statutory provision involved is Section 824(b) of the Federal Power Act, 49 Stat. 847, 16 U.S.C. Section 824(b). It is printed in Appendix A, infra, p. 23.

STATEMENT

The Philadelphia Electric Company made application to the Pennsylvania Public Utility Commission for a finding and determination that the exercise of the right of eminent domain in acquiring a right of way over some ten acres of Petitioners' land for the construction, operation and maintenance of a line for the transmission of electricity at a potential of 500 KV was necessary or proper under Section 4(b) of the Pennsylvania Act of May 21, 1921, P. L. 1057, 15 P.S. 1182 (R. 12a). It was recited in the application that the proposed 500 KV transmission line was part of the development of the Keystone Generating Station, a mine-mouth plant in Western Pennsylvania, provided a portion of the transmission system required to permit diverse use of generating facilities of all interconnected utilities in Pennsylvania and the Middle Atlantic States, and will be a link in what will ultimately become a major interconnection loop for the Middle Atlantic Region of the United States. The southern and northern portions of the loop would be joined in the west to the Allegheny Power System. The proposed line would be part of a transmission system which would be interconnected to the Carolinas-Virginia power pool which would create an important part of a nationwide high voltage network linking the eastern United States and Canada with the midwest and western part of the United States. It was further averred that the interconnections of large electric power systems provide more economic and reliable service to the public because they permit the

pooling of large electric generating capacity resulting in improvements in efficiency and economy of service and needed capacity in emergencies and strengthen the ability of the interconnected companies to contribute to the national defense.

Upon receipt of such application the Pennsylvania Public Utility Commission scheduled a hearing thereon for June 25, 1965. Prior to the date of such hearing, Petitioners filed a complaint in equity in the Commonwealth Court sitting in Harrisburg, Pennsylvania, challenging the jurisdiction of the Utility Commission to hear such application because of the interstate nature thereof (R. 6a) and requested a temporary and permanent injunction against the Commission (R. 11a). The Court denied the request for preliminary injunction on June 24, 1965 (R. 24a). Respondent, Philadelphia Electric Company, was allowed to intervene (R. 30a).

After answers were filed the matter came on for hearing August 17, 1965, on the request for permanent injunction (R. 35a). At the commencement of the hearing, Petitioners' counsel raised the federal question promptly when he said (R. 36a), the first question is "does the Federal Power Commission have sole jurisdiction over the transmission of electric energy in interstate commerce and related to that question is whether Pennsylvania Public Utility Commission, in view thereof, can possibly have jurisdiction if it is vested in the Federal Power Commission".

The evidence introduced before the Commonwealth Court supported the above allegations contained in the application of the Electric Company. On March 21, 1966,

the Chancellor filed the adjudication (R. 113a-132a) (Appendix B, pp. 24-42) and based the denial of the relief requested on the ground that neither in the federal Act in question nor in the regulations of the Federal Power Commission is any mention made "of the *construction* of new facilities". (Emphasis by the Court.) (R. 116a, Appendix B, p. 27.)

Petitioners' exceptions were dismissed by Court en Banc on December 27, 1966 (R. 145a-157a). Petitioners' appeal to the Pennsylvania Superior Court was certified on March 17, 1967, to the Pennsylvania Supreme Court (Appendix B, p. 54, and Appendix C, p. 60). The appeal was first heard before the Pennsylvania Supreme Court on May 23, 1967 and reargued at the direction of Pennsylvania Supreme Court on January 22, 1969. On April 23, 1969, the Pennsylvania Supreme Court filed an opinion (Appendix B, p. 54) affirming the final decree of the Court below, one Justice dissenting. It is to this latter Court that this Petition for Writ of Certiorari is directed. The basis for such affirmance was that given by the courts below, namely "the F.P.C. (Federal Power Commission) does not have jurisdiction over the *construction* of new facilities" (Appendix B, p. 27).

REASONS FOR GRANTING THE WRIT

1. Federal rate control is substantially impaired, if not rendered futile, prior to the incidence of federal regulation, by the distinction made by the State Courts. Regulation over the construction of the facilities and regulation over the facilities themselves is a distinction without difference as far as the Federal Power Act is concerned. It is important to observe that the Federal Power Act conferring jurisdiction on the Federal Power Commission makes no such distinction. Section 824(b) of the Act says the Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy. Whenever the Federal Power Act is hereinafter referred to, Petitioners mean Part II of the Federal Power Act enacted August 26, 1935 and sometimes referred to in the cases as the Federal Power Act of 1935, 16 U.S.C. Section 824(b) et seq. The pertinent section is Section 201 (b) of the Federal Power Act, 16 U.S.C. Section 824 (b) defining the scope of the Commission's jurisdiction is printed in full as Appendix A to this petition.

This Court has heretofore had a similar problem before it in *Jersey Central Power & Light Co. v. Federal Power Commission,* 319 U.S. 61, 71, 87 L. Ed. 1258, 63 Superior Ct. 953, 959, where the utility did not transmit or sell energy "at the instant it cross(ed) the state line" but generated the energy, transmitted it and sold it to the Public Service Electric & Gas Company which in turn passed it on into the State of New York. Accordingly, the

utility argued that since it did not directly transmit or sell energy in interstate commerce it was not a public utility subject to the Federal Power Act. This Court rejected that argument on the logical premise that if the Federal Power Commission could not regulate all of the elements which went into the concept of cost and rates (that is, the cost of the producers), then cost would be fixed prior to the incidence of federal regulation and federal rate control would be nullified, substantially impaired, and rendered futile.

And so here. If Federal Power Commission jurisdiction is denied merely on the ground that *"construction"* is not encompassed by the Federal Power Act, federal rate control of this interstate electrical transmission facility will be substantially impaired, if not rendered futile. Routing and costs of construction which play a most important part in establishing rate structure will be fixed before federal jurisdiction attaches. This result Congress never intended. Congress said in clear language that the "Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy", in interstate commerce. Accordingly, Petitioners submit that the local Pennsylvania Public Utility Commission had no jurisdiction to entertain the application of the Philadelphia Electric Company. This jurisdictional question and the federal question were promptly raised in the Pennsylvania Commonwealth Court as provided by Pennsylvania procedure which the Court below and the Pennsylvania Supreme Court have said was proper.

2. As a corollary to the proposition that the Federal Power Commission lacked jurisdiction over the construction of facilities for the interstate transmission of

electrical energy, the Pennsylvania trial and appellate courts determined that the Federal Power Act was aimed primarily at federal regulation of the interstate sale of electric energy. But again, the federal Courts have ruled to the contrary.

In *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953 (2nd Cir. 1942), the utility admitted that it engaged in interstate sales of electric energy but argued that since it owned no facilities for the interstate transmission of electrical energy it was not subject to the jurisdiction of the Federal Power Commission. It based its argument on the ground that the Federal Power Act applied to it only if the utility owned and operated facilities used in the interstate transmission of electrical energy *and* engaged in interstate wholesale sales.

The Second Circuit, however, rejected this contention and emphatically pointed out that this section of the Federal Power Act contained the disjunctive "OR", not the conjunctive "AND". It held that a utility was subject to the jurisdiction of the Federal Power Commission if the utility met either one of these tests, namely, had facilities for interstate *transmission* OR had facilities for interstate *sales*. The Second Circuit in *Hartford*, supra, said (p. 961):

> "Even if we issume that generation facilities are not within the Commission's jurisdiction under Section 201(b) or any other portion of Part II, and also that petitioner has no facilities for interstate transmission, still petitioner's contention is untenable: Section 201(b) confers jurisdiction over not only facilities (1) for interstate transmission but also—and

disjunctively—over facilities (2) for interstate wholesale sales."

The Pennsylvania State Courts are then wrong. The Federal Power Act is not aimed primarily at federal regulation of the interstate *sale* of electric energy but is equally aimed at federal regulation over all interstate facilities for the transmission of electric energy.

3. The admonition of this Court in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 210, 11 L. Ed. 2d 638, 84 Sup. Ct. 644, 648, has not been followed. In that case this Court said that the question of whether facilities are used in local distribution involves a question of fact to be decided by the Federal Power Commission as an original matter. It was there said (footnote 6):

> ". . . Whether facilities are used in local distribution—although a limitation on F.P.C. jurisdiction, and a legal standard that must be given effect in addition to the technological transmission test, Connecticut Light & Power Co. v. Federal Power Commission, supra, 324 U.S., p. 531, 65 S. Ct., p. 756, 89 L. Ed. 1150—involves a question of fact to be decided by the F.P.C. as an original matter . . ."

In this case, although the allegations and proof clearly show that Petitioners' property will form part of the facilities used for the transmission of electrical energy in interstate commerce, there has been no decision by the F.P.C. as an original matter that the facility here involved will be used in local distribution or in interstate transmission. Petitioners submit that this in itself is a fatal de-

fect in these proceedings and the exercise of jurisdiction by the local utility commission.

Until there is a decision by the F.P.C. that these facilities, including the *construction* thereof, are part of facilities used in local distribution, there is no jurisdiction in the State Commission or State Courts to entertain proceedings for the approval or disapproval of contemplated acquisition, construction and use of facilities thought to be used solely in local distribution.

The *Southern California Edison* case, supra, is nothing more than a logical extension of the exercise of federal jurisdiction in the state of the art as it has developed. Heretofore, high voltage transmission of electrical energy was unknown. With that development of high voltage electrical transmission, the principles and practices of yesteryear are no longer applicable. It is like the recent development of the interstate highway system over which federal jurisdiction is no longer questioned. True it is that for many years there was interstate linkage of concrete and similar roads and the Federal Government failed to exercise jurisdiction over the intrastate pattern of highway development. But with the advent of the need to move transportation more swiftly, safely and with improved standards, the federal government moved into this area and established standards for compliance. The same thing is true of transmission of electrical energy. For many years the states have been linked metallically and there has been an interstate flow of electricity without federal regulation. But with the development of the need for nation coordination of the flow of electrical energy the states are no longer equipped to handle what is now a national problem. Petitioners submit that ref-

erence to the great New York blackout in November, 1965 is sufficient to point up their argument.

4. The failure of the Federal Power Commission to exercise jurisdiction in this area is not to say that they have not the jurisdiction. The Chancellor in the trial court and the Pennsylvania Supreme Court relied heavily on the overtures (R. 158a-170½a) made by the Federal Power Commission to Congress seeking jurisdiction over the interstate transmission of electrical energy in support of the Courts' conclusion that federal jurisdiction failed to exist. The extent of the jurisdiction of a federal agency is not left to the agency or commission to decide if it has the authority.

This Court said in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616, 88 L. Ed. 1488, 64 Sup. Ct. 1215, 1220, rehearing denied 323 U.S. 809, 89 L. Ed. 645, 65 Sup. Ct. 27:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

Conversely, this Court has already determined that in the case of facilities as are involved here, the Federal Power Commission has the jurisdiction. In *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 72, 87 L. Ed. 1258, 63 Sup. Ct. 953, 959, this Court said:

> "Subsection (b) declares that the provisions of this part apply to the transmission of electric energy at wholesale in interstate commerce. This Subsection gives jurisdiction over facilities used for such transmission."

Even a casual grasp of the allegations and proof made in this case demonstrates that the facilities (some ten acres of Petitioners' property) are the kind of facilities encompassed by this section of the Federal Power Act as facilities for the transmission of electric energy at wholesale in interstate commerce.

5. The test of whether electric transmission lines fall within the jurisdiction of the Federal Power Commission is whether or not such lines are used in the transmission of interstate power and are not facilities used in local distribution. This was the test laid down by this Court in *Connecticut Light & Power Co. v. Federal Power Commission,* 324 U.S. 515, 531, 89 L. Ed. 1150, 65 Sup. Ct. 749, 756. There this Court ruled:

> ". . . The test is whether they are local distribution facilities . . . The order must stand or fall on whether this Company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution."

The Ninth Circuit has expressly ruled that in the situation, as is presented here of high voltage lines which transmit the energy in bulk to the substation, such high voltage lines may clearly not be classified as local distribution facilities: *Federal Power Commission v. Arizona Edison Co., Inc.,* 194 F. 2d 679, 683 (9th Cir. 1952). In this case the sole issue was whether the Arizona Edison Co., Inc., was subject to the jurisdiction of the Federal Power Commission where it too owned and and operated electric systems wholly within the state. Jurisdiction was asserted solely on the basis of ownership and operation of the lines for the transmission of the energy in bulk to

the substation (p. 680). The Court stated its problem (p. 681) was to determine whether the lines owned by the utility and used to transmit energy in bulk were properly classified by the Federal Power Commission as used in the "transmission of energy in interstate commerce" and not engaged solely in "local distribution or only for the transmission of electric energy in intrastate commerce".

There the utility contended, as does the Philadelphia Electric Company here, that all its facilities are located within Arizona (here in Pennsylvania); that all its customers are in Arizona (here in Pennsylvania); that it makes no sales for resale from the facilities in question and, hence, it follows that functionally the company commences the process of serving its customers the moment the energy enters its lines. In addition, the utility argued, as does the Philadelphia Electric Company here, that all its revenues are derived from sales of energy to customers rather than from the function of transmission as such. The utility also relied on the Federal Power Act which stated that regulation was to extend only to those matters not subject to regulation by the states and it was subject fully to regulation by Arizona. Lastly, the utility relied on *Connecticut Light & Power Co. v. Federal Power Commission,* supra, to support its contention that its activities are local distribution and outside the jurisdiction of the Federal Power Commission.

On the other hand, the Federal Power Commission argued in the *Arizona* case that "local distribution" does not begin until the transmission in bulk at high voltages had ended and subdivision of the energy for delivery to customers at the lower consumable voltages begins. The F.P.C. pointed out that the utilities' lines receive the out-

of-state energy and transmit it without break or diminution to the substations where the subdivision process commences. Until the energy reaches the substation the utility is simply completing the process of interstate transmission and the F.P.C. relied on *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268, 70 Sup. Ct. 266, to justify its assertion of jurisdiction.

The Ninth Circuit then proceeded to exhaustively analyze the *East Ohio Gas Co.* case (p. 681) and found it "strikingly similar, both factually and in statutory framework". The Court pointed out that Arizona's reliance on *Connecticut Light & Power* was misplaced because the U. S. Supreme Court remanded the case to the F.P.C. for the making of appropriate jurisdictional findings in the light of the tests laid down by the Court, that is, the test is whether they are local distribution facilities. In the *Arizona Edison* case, the Ninth Circuit held that on the basis of the findings that Arizona Edison owned and operated facilities for the transmission of electric energy in interstate commerce which is transmitted from the state in which it is generated and consumed outside thereof, Arizona Edison was subject to Federal Power Commission jurisdiction. In that case *the Court held that the jurisdictional foundation is the high voltage lines which transmit the energy in bulk to the substation* where the step down and subdivision are effected, and not the step-down facilities themselves (p. 683).

In this case the Philadelphia Electric Company will own and operate *the high voltage lines which transmit the energy in bulk to the Whitpain Substation,* which high voltage lines pass over and will be an integral part of Pe-

titioners' property (Finding of Fact No. 10, 129a). All of the energy passing over the 500 KV line, from Peach Bottom substation to the Whit pain substation, will be owned by intervening defendant and will enter into its distribution system at Whitpain, and any energy which may thereafter flow to other companies under power-pool arrangements will do so as part of a plan to furnish more economical and more dependable service to electric customers. The Superior Court of Pennsylvania has already determined the nature of the Keystone Project in *Clemmer v. Pennsylvania Public Utility Commission,* 207 Pa. Superior Ct. 388, 217 A. 2d 800 (1966). There that Court held that the generators in Armstrong County are connected by more than 600 miles of 500 KV transmission lines with a power pool for Pennsylvania, New Jersey and Maryland and operated through six substations. It was there said (p. 391) that this pool in turn is connected with other pools with service connections extending west to the Rocky Mountains, south to the Gulf of Mexico and north through New York State into northeastern United States and Canada. The purpose of this arrangement is to give an unrestricted interchange of electrical energy. Eventually it will be a major tie-in for the Middle Atlantic Region of the United States.

It is much too late for the Philadelphia Electric Company to deny that high voltage electricity will flow over Petitioner's property in bulk in interstate commerce. That, in fact, is the allegation made in its application to the Commission in this case, a copy of which was attached to the complaint in equity (12a-18a) and admitted in the pleadings (10a, 27a, 34a). The Philadelphia Electric Company alleged (15a), "The proposed line (across Petition-

ers' property) provides a portion of the transmission system required (1) to economically transmit low-cost energy from Keystone Generating Station to the applicants' service area, (2) to permit diverse use of generating facilities of all interconnected utilities in Pennsylvania and the Middle Atlantic States". It was further alleged (16a), "The proposed line will be a link in what will ultimately become a major interconnection loop for the Middle Atlantic Region of the United States. The southern and northern portions of the loop, established initially, will also be joined in the west to the Allegheny Power System. The proposed line is thus part of a transmission system which will be interconnected to the Carolina-Virginia power pool in the near future. The interconnections of these various power pools will create an important part of a nationwide high voltage network linking the eastern United States and Canada with the midwest and western part of the United States".

The Court below found these to be the facts (128a to 130a). The Chief Engineer for the Philadelphia Electric Company testified in chief, and by which the Philadelphia Electric Company is bound, that the electrical energy will flow across Petitioners' land in interstate commerce (86a). He testified that electrical energy will flow from the Keystone Station through the Yukon Substation into the Allegheny Power System and through other systems and back in through the Potomac Electric Power System into Baltimore-Peach Bottom-Whitpain (81a). This witness readily admitted that the line across Petitioners' property is not a local distribution facility but it will be a link in the major inter-ties with the Atlantic Region of the United States, wil' be joined in the west to the Allegheny Pow-

er System and will be interconnected to the Carolina-Virginia power pool (91a).

At the time this suit was commenced in 1965 it was common knowledge that never before in the history of the United States had an electrical transmission project of this magnitude been attempted. Pacific Gas & Electric Company, the nation's largest investor-owned gas and electric utility was erecting more than 1,000 miles of 500 KV extra-high voltage lines in northern and central California and tests on the first section were not scheduled until March 1, 1967. When the Federal Congress approved a vast Pacific Coast power-grid complex in 1964, the Pacific Gas & Electric Company's supervising electrical engineer remarked, "There are only three lines in the nation operating at over 345,000 volts—and they are experimental. If we want answers to certain extra-high voltage operating questions, we must find them for ourselves".

The trade journals are today filled with evidence of new developments in this area and in particular of the development of underground transmission facilities which no longer permit the loss of more than 40% of the electrical energy and which heretofore militated against placing wires underground.

The Pennsylvania Public Utility Commission is apparently not equipped to handle such vast projects as this. It certainly is not in a position to oversee or supervise an interstate grid complex. Its state jurisdiction is limited to intrastate matters. It has manifested no concern with the beautification of America nor of the absolute necessity for community planning for the proper utilization of

our land. No planning agency, county or otherwise, was given an opportunity to be heard. In fact, the examiner in the P.U.C. hearing in this matter refused to permit a township supervisor for Worcester Township to be heard even though he was present at the hearing and was anxious to present the community needs and circumstances. The Second Circuit recently had occasion to admonish the Federal Power Commission for its failure to include the study of preservation of natural beauty and historic shrines and fisheries question. The Court there said (p. 624), the Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered: *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608 (2nd Cir. 1965).

Accordingly, then, Petitioners submit without peradventure of doubt that the Philadelphia Electric Company has proved that the facilities owned by Petitioners meet the tests laid down by this Court in *Connecticut Light & Power Co. v. Federal Power Commission*, supra, as facilities to be used in the transmission of interstate power over which only the Federal Power Commission has jurisdiction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. WILLISON SMITH, JR.,

BAYARD M. GRAF,
Counsel for Petitioners

July , 1969

APPENDIX "A"

STATUTE INVOLVED

The Federal Power Act, Act of June 10, 1920, C. 285, Section 201, as added by the Act of August 26, 1935, C. 687, Title II, Section 213, 49 Stat. 847, 16 U.S.C. 824(b):

> "(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State of State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

APPENDIX B

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. 2721 Equity

No. 330 Commonwealth Docket, 1965

J. Willison Smith, Jr. and Elizabeth K. Smith,
his wife,
Plaintiffs

v.

Pennsylvania Public Utility Commission,
Defendant

and

Philadelphia Electric Company,
Intervening Defendant

ADJUDICATION

By the Chancellor:

Plaintiffs, who own two parcels of land in the Township of Worcester, Montgomery County, through which a proposed line for the transmission of electricity was designed to pass, filed their complaint in equity in this court

against the Pennsylvania Public Utility Commission asking that we (1) temporarily enjoin the Commission from holding any hearing on the application of Philadelphia Electric Company for approval of the exercise of the right of eminent domain under the provisions of the Act of May 21, 1921, P. L. 1057 (15 P.S. §1182), and (2) after final hearing in this court "permanently enjoin the Pennsylvania Public Utility Commission from finding and determining that the service to be furnished by the Philadelphia Electric Company through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience, or safety of the public as to the proposed appropriation of plaintiffs' property, it being [allegedly] unnecessary for the corporate use of the applicant, Philadelphia Electric Company".

After an immediate hearing on the question of the temporary relief sought, the chancellor denied the plaintiffs' prayer for a temporary injunction.

Thereafter, Philadelphia Electric Company was permitted to intervene as a party-defendant and when answers were filed by both defendants a full hearing was had on the merits. All parties then argued their respective legal positions.

The plaintiffs aver that the service to be furnished by the line in question is not necessary for the corporate use of Philadelphia Electric Company and its customers in its franchised area, but on the contrary that the line will become a part of the Keystone Project", a link in a major inter-tie for the Middle Atlantic Region of the United States, and later a link in a continental system. They then aver that Philadelphia Electric has no right to

condemn plaintiffs' land for this type of use and consequently challenge the jurisdiction of the Public Utility Commission to entertain such a matter.

At the hearing plaintiffs raised the additional question of whether jurisdiction over the matter here in issue; i.e., the right to condemn land for this type of high voltage electric line, was exclusively in the Federal Power Commission and thus not in the Pennsylvania Public Utility Commission at all. This question should be considered first.

The Federal Power Act, Act of June 10, 1920, c. 285, as amended by the Act of August 26, 1935, c. 687, Title II, §213 et seq. (16 U.S.C.A. §824 et seq.) concerns the "*transmission*[1] of electric energy in interstate commerce and the *sale* of . . . [electric] energy at wholesale in interstate commerce. . . ."

In 16 U.S.C.A. §824(a),

> "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824-825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*"

[1] Emphasis ours throughout unless otherwise noted.

And, further in 16 U.S.C.A. §824(b), it is stated that,

> "*The Commission* shall have jurisdiction over all facilities for such transmission or sale of electric energy, but *shall not have jurisdiction*, except as specifically provided in said sections, *over facilities used* for the generation of electric energy or over facilities *used in local distribution* or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Plaintiffs' position is that this act gives the Federal Power Commission exclusive jurisdiction over all *facilities* of a public utility used or to be used in such transmission and therefore the condemnation of a right-of-way over and across plaintiffs' land (which plaintiffs aver would be a *facility* of Philadelphia Electric, a public utility) cannot be considered by the Pennsylvania Public Utility Commission. The chancellor cannot agree with plaintiffs' position.

Nowhere in the federal act in question nor in the regulations of the Federal Power Commission, as far as we can determine, is there any mention of the *construction* of new facilities. The emphasis throughout is on the regulation of sale and transmission of electric energy and then only of such energy as is sold in interstate commerce at wholesale.

None of the authorities cited by plaintiffs convinces the chancellor that the jurisdiction of the Federal Power Act goes as far as plaintiffs suggest. Hartford Electric Light Co. v. Federal Power Commission, 131 F. 2d 953 (1942) required the utility only to submit reports; and

Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964), held only that the Federal Power Commission had jurisdiction over the *sale* of the energy there in question.

On the other hand there are many indications that such jurisdiction does not extent to a situation such as we have here. In Jersey Central Power & Light Co. v. Federal Power Commission, 129 F. 2d 183 (1942), it was said, by way of dicta, that the act in question was intended to impose federal regulations only over those matters which could not effectively be controlled by the states, and it was there pointed out that no bill in recent years has so recognized the responsibility of the state regulatory bodies. On appeal to the United States Supreme Court (319 U.S. 61 (1943)), such limitation of jurisdiction was also recognized in this language: "The purpose of this act was primarily to regulate *the rates and charges of the interstate energy*" (at 71), and the spokesman for The National Association of Railroad and Utility Commissioners which drafted the amendments which finally became Section 201(a) (16 U.S.C.A. §824), was quoted in Mr. Justice Roberts' dissent as saying:

> "'We have, accordingly, sought to make it as clear as language will that Congress does not in this case intend to regulate anything except interstate power, sold at wholesale.'"

The Pennsylvania Superior Court in Northern Pa. Power Co. v. Pa. P.U.C., 132 Pa. Super. 178, 193 (1938), rev'd on other grounds 333 Pa. 265 (1939), had previously voiced the same opinion when it said, "it is clearly the purpose of the entire act to regulate only those matters

which pertain to the interstate exchange of wholesale power".

Indicative of the position that the Federal Power Commission itself takes on this matter is that in the First Session of the 89th Congress the Commission proposed two bills, either of which would have *extended* the Commission's jurisdiction to the construction of lines to carry extra-high voltage electricity, which jurisdiction apparently none of the Commissioners thought they had under existing law. Neither of these bills passed Congress.[2]

We turn now to the other contention of the plaintiffs; that is, that the Pennsylvania Public Utility Commission has no jurisdiction to entertain a proceeding to determine whether or not the service proposed to be furnished by the line in question here is necessary or proper for the service, accommodation, convenience or safety of the public. Plaintiffs base this contention on the statutory law giving corporations of the class of Philadelphia Electric the right to appropriate property "*necessary for its corporate use* in the construction, erection, operation, or maintenance of its . . . facilities . . . for the transmission or distribution . . . [of electric light, heat and power]".

Under Section 401 of the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053 (66 P.S. §1171),

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[2] See Senate Bills 2139 and 2140 and the Congressional Record of Monday, June 14, 1965, pages 12959-12961 containing letters to the President of the Senate from members of the Federal Power Commission explaining their respective positions relative to the two bills, of all of which the chancellor takes judicial notice.

a Pennsylvania public utility is required to provide the following character of service and facilities:

> "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements, in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employes, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. . . ."

To meet these requirements the legislature has conferred upon electric utility corporations the power to appropriate property.

The act in question here is the Act of May 8, 1889, P. L. 136, as supplemented by Act of May 21, 1921, P. L. 1057 (15 P.S. §1182) which provides, in pertinent part:

> "[F]or the purpose of supplying light, heat, and power, or any of them, by means of electricity, to the public in the borough, town, city, or district where it may be located, and to such persons, partnerships, and corporations residing therein or adjacent thereto as may desire the same [electric utility corporations shall] have the following rights and powers:
>
> . . . . . .
>
> "(b) To appropriate property, outside the limits of public streets, lanes, alleys, or highways, and within the borough, town, city, or district where it

may be located, necessary for its corporate use in the construction, erection, operation, or maintenance of its buildings, machinery, apparatus, plants, works, equipment, and facilities for generating electric light, heat, and power, or any of them, for the transmission or distribution thereof . . . And provided further, That before any such company shall exercise the power conferred by this subsection, the Public Service Commission[3] of the Commonwealth of Pennsylvania, upon application of such company, shall have found and determined, after public hearing, that the service to be furnished by said company through the exercise of said power is necessary or proper for the service, accommodation, convenience, or safety of the public. . . ."

Plaintiffs aver that since, as they allege, the energy to be transmitted over this line will partially go to other utilities both in Pennsylvania and in neighboring states, the energy is not therefore necessary for Philadelphia Electric's "corporate use" and consequently Philadelphia Electric has no authority to condemn the land on which the facility to carry the line is to be constructed nor over which the line is to extend.

There are several reasons why plaintiffs' position is unsound. Even if we should assume that part of the energy transmitted over the line in question will be sold by Philadelphia Electric to other utilities in Pennsylvania or elsewhere, still, this would not defeat Philadelphia Electric's right to condemn the necessary land. In Phillips v. Pa. P.U.C., 181 Pa. Super. 625 (1956), the Superior

[3] Now the Pennsylvania Public Utility Commission.

Court upheld the Pennsylvania Public Utility Commission in its approval of the application of the Philadelphia Electric Company (the same company that is the intervening defendant in the instant case) for approval of the right to condemn land for an electric line where the record showed that the purpose of the line was to coordinate the company's system to assure adequate service to the Chester-Marcus Hook area to "integrate the network" and to enable Philadelphia Electric "to supplement power deficient areas from adjacent areas having available capacity". The court speaks approvingly of the integration with other Atlantic Seaboard utilities. To the same effect is Laird v. Pa. P.U.C., 183 Pa. Super. 457 (1957), where the line in question was, as in the instant case, a high power transmission line which was to be interconnected with lines of the Pennsylvania Power & Light Company and Public Service Electric & Gas Company.

In Stone v. Pa. P.U.C., 192 Pa. Super. 573 (1960), the Superior Court again had before it an order of the Pennsylvania Public Utility Commission approving the right of Philadelphia Electric to condemn the land of an individual for construction of a high power transmission line. That line was to extend from the company's generating station in York County to the Pennsylvania-Maryland State line where it was to connect with a similar line to be constructed in Maryland by the Baltimore Gas & Electric Company.

The testimony in the lower court, as quoted in a footnote in the Superior Court report (at 576) showed that this new nuclear-powered generating station

> "[W]ill have a capability of transmitting 400,000 kvs, [and] will provide the strong link necessary

to properly integrate these two systems so as to meet, adequately and safely, the varying and growing system load demands and to maintain constant voltage and frequency stability.

"Moreover, by increasing the alternate sources of supply, this interconnection also improves reliability of service on both systems during periods of emergency caused by loss of transmission lines or generating capacity.

* * * * * * * *

"The proposed high voltage interconnection will provide needed reinforcement to the transmission system of the Pennsylvania-New Jersey-Maryland Interconnection and to FPC areas 5 and 6, and thus will benefit not only customers of the Philadelphia Electric Company and the Baltimore Gas & Electric Company but also all customers served by the interconnecting companies . . ."

In sustaining the Public Utility Commission, Judge Wright, speaking for the Superior Court, said that:

"One of the principal considerations of public convenience and necessity is the need for integration of the bulk power transmission systems of Philadelphia and Baltimore. Notwithstanding appellant's unsupported assertion to the contrary, it clearly appears that the interconnection will enable both systems to obtain greater economies of operation. Furthermore, each system will be able to meet, adequately and safely, its varying and growing load demands and to maintain constant voltage frequency, stability, and reliability of service. Another principal element of

necessity is that there are no existing facilities to provide for the transmission of the initial block of power from the proposed Peach Bottom Generating Station to distribution centers. Last, but not least, there is the important element of need for additional power supply routes in the event of a national emergency." Stone v. Pa. P.U.C., supra, at 579.

In the instant case it is true, as plaintiffs contend and as intervening defendant admits, the Keystone Project is a plan for the construction of a steam electric generating station in the heart of the bituminous coal region of western Pennsylvania, in Armstrong County, so that electric energy can be generated at the site of a coal mine and transmitted from that point to the service areas of the participating companies. There are seven participating companies, of which Philadelphia Electric is one. The Keystone Station is owned by the participating companies as tenants in common. There will be two 900,000 kilowatt turbo generators, having a generating capacity of 900,000 kilowatts each, or a total of 1,800,000 kilowatts. The first unit is scheduled for operation on May 1, 1967 and the second one on May 1, 1968.

The transmission lines and facilities associated with this project consist of two 500 KV lines running eastwardly from the generating station in Armstrong County to a substation called Juniata located near Harrisburg, Pennsylvania, on the Pennsylvania Power & Light Company system. From the Juniata substation one 500 KV line will be constructed to the Peach Bottom substation which is in the Philadelphia Electric system, and from Peach Bottom a 500 KV line will be constructed to a sub-

station known as Whitpain, also on the Philadelphia Electric system. This latter line is the one here in issue.

Other transmission lines to be constructed in connection with the Keystone Project include the 500 KV line from the Juniata substation to Branchburg on the Publis Service Electric & Gas Company System (New Jersey), and the 500 KV line from Peach Bottom to the Baltimore Gas & Electric Company system. This the basic arrangement between the participating parties known as the Keystone Project; i.e., a joint plan of participating by Philadelphia Electric and other electric utilities to generate electric energy and transmit it to their distribution service areas, each participating company erecting and owning the line in its respective territory.

From the Keystone Station, Philadelphia Electric will receive electric energy at the Peach Bottom substation located in York County, Pennsylvania, on the Susquehanna River, and from Peach Bottom, Philadelphia Electric will transmit the electric energy to its Whitpain substation in Whitpain Township, Montgomery County, Pennsylvania.

In the instant case, however, the record clearly shows that the primary purpose of the line in question is to carry electric energy to Philadelphia Electric's own customers and within its franchised area. Actually, the line will probably carry energy from Philadelphia Electric's Muddy Run Pumped Storage Hydro-Electric Plant now being constructed in Lancaster County and owned exclusively by Philadelphia Electric, to its customers some months before any energy from the Keystone Project is introduced into the line.

The record also clearly shows that Philadelphia Electric needs more generating capacity to supply its customers with electric light, heat and power and that the energy produced by the Muddy Run Project and its share of that produced by the Keystone Project will be necessary for this purpose (N.T. 22, 25, 32, 33).

It is common practice for electric companies in the United States to enter into interconnecting pool arrangements so that electric energy can flow back and forth between the companies if necessary and this is of great benefit to the customers of all the companies in the pool in many ways and while Philadelphia Electric is a member of such a pool with ten other participating companies in this and adjacent states, the line in question is not being constructed for purposes of the interconnecting pool arrangement (N.T. 35-36).

It must be concluded that the Public Utility Commission has jurisdiction to entertain the petition of Philadelphia Electric to determine whether or not the service proposed by the line in question is necessary or proper.

The defendant, Public Utility Commission, while not strenuously objecting to the jurisdiction of this court in this matter,[4] did point out in its brief that the Pennsylvania Supreme Court has frequently said that a court of equity has no jurisdiction to determine the authority of the condemning party and that this authority must be determined in the eminent domain proceedings.

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[4] In paragraph 5 of its answer, the Commission denied that this court is the *exclusive* forum in which to raise the question of the Commission's jurisdiction, and then, in the same paragraph elected not to raise the question of jurisdiction.

The Public Utility Law, Act of May 28, 1937, P. L. 1053, §1111 (66 P.S. §1441), however, provides:

> "No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except in a proceeding questioning the jurisdiction of the commission, and then only after cause shown upon a hearing. The court of common pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth, of all proceedings for such injunctions, subject to an appeal to the Superior Court as aforesaid."

It was on the basis of this section of the law that plaintiffs relied in instituting their action here. In Reed v. Pa. P.U.C., 174 Pa. Super. 132, 136-37 (1953), where Duquesne Light sought Commission approval for the exercise of the right of condemnation under the same eminent domain authority that pertained to Philadelphia Electric Company here and the property owner moved to dismiss for lack of jurisdiction, the Superior Court said:

> "In so far as the appellant property owners sought a preliminary test of the jurisdiction of the Commission over the parties or the subject matter, and the Commission did not dismiss for lack of jurisdiction but persisted in entertaining jurisdiction, their exclusive remedy to test the jurisdiction of the Commission in limine is under section 1111 of the Public Utility Law of May 28, 1937, P. L. 1053, 66 PS §1441, by applying for an injunction against the Commission in the Court of Common Pleas of Dauphin County. Sayre Land Company v. Pennsylvania Public Utility Commission, 167 Pa. Superior Ct. 1, 8, 74 A. 2d 713."

In view of the foregoing, the chancellor makes the following

FINDINGS OF FACT

1. The plaintiffs are the owners of real estate situate in Worcester Township, Montgomery County, over which a proposed electric transmission line of Philadelphia Electric Company, the intervening defendant, will pass.

2. Intervening defendant has applied to the Pennsylvania Public Utility Commission for the approval of the exercise of the right of eminent domain in order to construct the said electric transmission line.

3. Intervening defendant has the charter right to supply light, heat and power by electricity to the public in Worcester Township, Montgomery County, Pennsylvania, including the area in which plaintiffs' land is located and is in fact the public utility corporation furnishing electric service in the area.

4. Intervening defendant serves a franchised area of about 2,100 square miles in Pennsylvania, with a population of 3,750,000 and 1,125,000 electric customers.

5. Intervening defendant has not presently sufficient generating capacity to adequately meet the needs of its electric customers in the immediate future.

6. Intervening defendant is a participant in the Keystone Project, a mine-mouth soft coal generating plant situate in Armstrong County, and as such is entitled to receive a share of the energy to be generated at the Keystone Generating Plant.

7. The proposed 500 KV line from Peach Bottom, York County, to a substation to be known as Whitpain in Montgomery County will transmit the energy of intervening defendant generated at the Keystone Station to intervening defendant's distribution system.

8. The line from Peach Bottom to Whitpain will also transmit electric energy to be generated by intervening defendant at its Muddy Run Hydro-Electric station, with a capacity of 800,000 kilowatts, and the line would be necessary to transmit Muddy Run energy even if there were no Keystone Project.

9. Energy generated at the Keystone Project in Armstrong County will be transmitted by other electric companies until it reaches the service area of intervening defendant.

10. All of the energy passing over the 500 KV line, from the Peach Bottom substation to the Whitpain substation, will be owned by intervening defendant and will enter into its distribution system at Whitpain, and any energy which may thereafter flow to other companies under power pool arrangements will do so as part of a plan to furnish more economical and more dependable service to electric customers.

11. The primary purpose of the Keystone Project is to take care of substantial deficiencies in generating capacities of intervening defendant.

12. The primary purpose of the line from Peach Bottom to Whitpain is to transmit the additional energy required by Philadelphia Electric to supply the needs of its electric customers.

13. The proposed transmission line which will cross plaintiffs' property will bring to intervening defendant's distribution system its portion of the energy from the Keystone Project and all of the energy from Muddy Run. The line is an important link between the sources of electric power and intervening defendant's customers for the present and future load growth of the company.

14. Intervening defendant is a member of the Pennsylvania-New Jersey-Maryland power pool, and power pools of this nature result in more economical and more dependable service to the customers of each participating company.

15. Appropriation of the plaintiffs' property is necessary for intervening defendant's corporate use in the generation, transmission and distribution of electrical energy.

CONCLUSIONS OF LAW

1. The parties are properly before the court, having duly filed complaint and answers and entered appearances.

2. This court has jurisdiction of the subject matter under the Act of May 28, 1937, P. L. 1053, §1111 (66 P.S. §1441).

3. The Federal Power Commission has no jurisdiction of the question raised in these proceedings.

4. The Act of May 21, 1921, P. L. 1057 (15 P.S. §1182), permits an electric company to appropriate prop-

erty necessary for its corporate use in connection with the generating, transmission or distribution of electrical energy.

5. The appropriation of plaintiffs' property will be for intervening defendant's corporate use.

6. The Pennsylvania Public Utility Commission has jurisdiction to find and determine after public hearing that the service to be furnished by intervening defendant through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience or safety of the public.

7. The prayer of the plaintiffs' complaint that the Pennsylvania Public Utility Commission be permanently enjoined from finding and determining that the service to be furnished by Philadelphia Electric Company through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience or safety of the public as to the proposed appropriation of plaintiffs' property should be denied.

DECREE NISI

And Now, this 21st day of March 1966, the prayer of the plaintiffs' complaint that the Pennsylvania Public Utility Commission be permanently enjoined from finding and determining that the service to be furnished by the Philadelphia Electric Company through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience, or safety of

the public as to the proposed appropriation of plaintiffs' property is hereby denied.

The Prothonotary shall give notice of the filing of this adjudication and decree nisi to the parties or their attorneys forthwith.

If no exceptions are filed hereto within twenty (20) days after notice of the filing hereof, the decree nisi may be entered by the Prothonotary as the final decree.

R. Dixon Herman
Chancellor

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. 2721 Equity

No. 330

Commonwealth Docket, 1965

J. Willison Smith, Jr. and Elizabeth K. Smith, his wife,
Plaintiffs

v.

Pennsylvania Public Utility Commission,
Defendant

and

Philadelphia Electric Company,
Intervening Defendant

OPINION

By the Court:

This matter is before this court by virtue of a complaint in equity brought by the Smiths against the Pennsylvania Public Utility Commission to enjoin the Commission from finding and determining that certain service sought to be furnished by Philadelphia Electric Company, the intervening defendant, through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience or safety of the public as to the proposed appropriation of plaintiffs' property. In the complaint it was alleged that the appropriation of plaintiffs' property was unnecessary for the corporate use of Philadelphia Electric Company. At the hearing on the matter before a chancellor and after answers had been filed by both the defendant and the intervening defendant, plaintiffs advanced another ground for their requested relief. They then contended also that under the Federal Power Act, Act of June 10, 1920, c. 285, as amended by the Act of August 26, 1935, c. 687, Title II, §213 et seq. (16 U.S.C.A. §824 et seq.), the Federal Power Commission and not the Pennsylvania Public Utility Commission had sole and exclusive jurisdiction of the matter.

The Chancellor after hearing and subsequent full argument by all counsel, filed his Adjudication [1] in which he discussed at length the questions of fact and law involved, made fifteen Findings of Fact, and arrived at

[1] Reported in 85 Dauphin 106.

seven Conclusions of Law, and entered a Decree Nisi denying the prayer of plaintiffs' complaint.

Plaintiffs have filed forty-one Exceptions to the Chancellor's Findings of Fact; to his Conclusions of Law; to his refusal to find other facts and conclusions of law requested by the plaintiffs; to portions of the discussion, and to the Decree Nisi.

Plaintiffs' first 4 Exceptions relate to the Chancellor's Findings of Fact Nos. 8, 10, 11 and 15. The Exceptions 5 through 8, inclusive, relate to the Chancellor's Conclusions of Law Nos. 3, 5, 6, and 7. Plaintiffs' Exceptions 9 to 21, inclusive, relate to the Chancellor's "refusal" of plaintiffs' requests for Findings of Fact Nos. 4, 10, 11, 14, 17, 18, 20, 21, 22, 23, 25, 26, and 27. Plaintiffs' Exceptions 22 to 33, inclusive, are general exceptions to the Chancellor's "refusal" of plaintiffs' requests for Conclusions of Law Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15. Plaintiffs' Exceptions 34 to 40, inclusive, are to portions of the Chancellor's discussion, and plaintiffs' Exception 41 relates to the Decree Nisi.

Pennsylvania Rules of Civil Procedure (more particularly Pa. R.C.P. No. 1519(b)) require us to answer specifically only those exceptions which aver a failure to make substantial disposition of a request for a finding of fact (in the instant case Exceptions 9 to 21, inclusive) (Goodrich-Amram, §1519(b)-2). Nevertheless, we have thoroughly examined *all* of plaintiffs' exceptions in the light of the pleadings and the record and find no merit in them, and dismiss all of them.

Finding of Fact No. 8, which is the subject of plaintiffs' Exception No. 1, reading as follows:

"8. The line from Peach Bottom to Whitpain will also transmit electric energy to be generated by intervening defendant at its Muddy Run Hydro-Electric station, with a capacity of 800,000 kilowatts, and the line would be necessary to transmit Muddy Run energy even if there were no Keystone Project."

is amply supported by the record (N.T. 22, 24-25, 27 and 48).

Finding of Fact No. 10, which is the subject of plaintiffs' Exception No. 2, reading as follows:

"10. All of the energy passing over the 500 KV line, from the Peach Bottom substation to the Whitpain substation, will be owned by intervening defendant and will enter into its distribution system at Whitpain, and any energy which may thereafter flow to other companies under power pool arrangements will do so as part of a plan to furnish more economical and more dependable service to electric customers."

is amply supported by the record (N.T. 24 and 34-37).

Finding of Fact No. 11, which is the subject of plaintiffs' Exception No. 3, reading as follows:

"11. The primary purpose of the Keystone Project is to take care of substantial deficiencies in generating capacities of intervening defendant."

is amply supported by the record (N.T. 25 and 32).

Finding of Fact No. 15, which is the subject of plaintiffs' Exception No. 4, reading as follows:

"15. Appropriation of the plaintiffs' property is necessary for intervening defendant's corporate

use in the generation, transmission and distribution of electrical energy."

is amply supported by the record (N.T. 24-28, 32-35 and 48).

Plaintiffs' Exceptions 5, 6, 7 and 8 except to the Chancellor's Conclusions of Law Nos. 3, 5, 6 and 7, which are as follows:

"3. The Federal Power Commission has no jurisdiction of the question raised in these proceedings.

"5. The appropriation of plaintiffs' property will be for intervening defendant's corporate use.

"6. The Pennsylvania Public Utility Commission has jurisdiction to find and determine after public hearing that the service to be furnished by intervening defendant through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience or safety of the public.

"7. The prayer of the plaintiffs' complaint that the Pennsylvania Public Utility Commission be permanently enjoined from finding and determining that the service to be furnished by Philadelphia Electric Company through the exercise of the power of eminent domain is necessary or proper for the service, accommodation, convenience or safety of the public as to the proposed appropriation of plaintiffs' property should be denied."

Plaintiffs' exceptions to these conclusions are bald exceptions without any supporting authority. We have

examined the record and all of the cases and statutes cited in the briefs and conclude, as did the Chancellor who discussed at length in his Adjudication the relevant facts and the law applicable thereto, that the said Conclusions of Law are proper and are supported by the facts of the case.

We turn now to plaintiffs' Exceptions Nos. 9 to 21, inclusive, which relate to plaintiffs' requested findings which were allegedly refused by the Chancellor.

At the outset we point out that the Chancellor in his discussion did make substantial disposition of all of them and cannot now be said to have refused them. None of them are relevant to the issues as found by the Chancellor and many of them are not accurate or supported by the evidence.

Plaintiffs' Exception No. 9 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 4:

> "4. The 500 K.V. line which will cross plaintiffs' property is part of the Keystone Project and will be a link in what will ultimately become a major interconnection loop for the Middle Atlantic Region of the United States."

is not relevant to the issues involved and is dismissed.

Plaintiffs' Exception No. 10 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 10:

> "10. There are seven participating companies in the Keystone Project, including the Atlantic City Electric Company, Baltimore Gas and Electric Company, Delaware Power and Light Company, Public

Service Electric and Gas Company, Philadelphia Electric Company, Pennsylvania Power and Light Company and Jersey Central Power and Light Company."

is not relevant to the issues involved and is dismissed.

Plaintiffs' Exception No. 11 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 11:

"11. The Keystone Project transmission lines are located in the States of Pennsylvania, Maryland, New Jersey and New York."

is not relevant to the issues involved and is dismissed.

Plaintiffs' Exception No. 12 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 14:

"14. Electric energy from the Keystone Project will flow from the Whitpain Station to other systems specifically including the Pennsylvania, New Jersey, Maryland interpool."

is not supported by the evidence, but if it were it would be irrelevant to the issues and is dismissed.

Plaintiffs' Exception No. 13 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 17:

"17. The Keystone Project will increase the capacity of the existing interpool arrangements to permit power to flow where it needs to flow."

is not relevant to the issues and is dismissed.

Plaintiffs' Exception No. 14 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 18:

"18. Companies which are members of the Pennsylvania, New Jersey, Maryland interpool arrangement, although not members of the Keystone Project, will receive energy from the Keystone Project."

is not supported by the evidence, but if it were it would not be relevant to the issues and is dismissed.

Plaintiffs' Exception No. 15 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 20:

"20. Electric energy will flow from the Keystone Station through the Yukon Substation into the Allegheny power system and through some other systems and back in through the Potomac Electric Power System into Baltimore-Peach Bottom-Whitpain."

is not supported by the evidence, but if it were it would not be relevant to the issues and is dismissed.

Plaintiffs' Exception No. 16 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 21:

"21. The proposed line across plaintiffs' property will be a link in the major inter-ties with the Atlantic Region of the United States, will be joined in the West to the Allegheny Power System and will be interconnected to the Carolina-Virginia power pool."

is not relevant to the issues and is dismissed.

Plaintiffs' Exception No. 17 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 22:

"22. The Keystone Project and its transmission lines will be a link in the interconnection from the

Gulf of Mexico to New York and into New England and Canada and from the Atlantic to the Rockies."

is not relevant to the issues and is dismissed.

Plaintiffs' Exception No. 18 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 23:

"23. The Keystone Project will be part of the free-flowing network, flowing in accordance with certain technical electrical laws and rules covering the area from the Gulf of Mexico to New York and into New England and Canada and from the Atlantic to the Rockies."

is not relevant to the issues and is dismissed.

Plaintiffs' Exception No. 19 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 25:

"25. Intervening defendant, Philadelphia Electric Company, testified before the Pennsylvania Public Utility Commission on June 25, 1965, that there is a right-of-way proposed from the Whitpain substation in Pennsylvania to the Branchburg substation in New Jersey."

is not relevant to the issues and is dismissed.

Plaintiffs' Exception No. 20 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 26:

"26. The electric energy sold to members of the Pennsylvania, New Jersey, Maryland interpool arrangement but who are not memebers [sic] of the Keystone Project will receive electric energy trans-

> mitted across state lines in interstate commerce and involves the sale of electrical energy at wholesale."

is not supported by the evidence, but even if it were it would not be relevant to the issues and is dismissed.

Plaintiffs' Exception No. 21 to the alleged refusal of the Chancellor to find plaintiffs' Finding of Fact No. 27:

> "27. Intervening defendant, Philadelphia Electric Company anticipates receiving 184,000 kilowatts from each unit or a total of 367,000 or 368,000 kilowatts from the two machines forming the Keystone Project which closely approximates the amount of energy alleged in its Application to the P.U.C., Paragraph 11e thereof, to be anticipated as 378 mw . . . which latter figure more accurately reflects the interest of Philadelphia Electric Company at 20.99% in the Keystone Project as shown on the letter of Public Service Electric and Gas Company dated July 8, 1965 . . ."

is not relevant to the issues and is dismissed.

Requests for findings of fact and conclusions of law are, of course, merely suggestions to be considered by the chancellor (Pa. R.C.P. 1516), and the chancellor may, as he did here, make his own independent findings and conclusions.

Plaintiffs' Exceptions 22 to 33, inclusive, are to the Chancellor's refusal to make conclusions of law as suggested by plaintiff as Nos. 1 to 15.

The suggested conclusions are either not supported by the facts or are not relevant to the issues involved, or both, and all such exceptions must be dismissed.

Exceptions to the discussion need not be specifically considered. See 10 Anderson, Pa. Civ. Pract., Rule 1518 (1954), and Whitehall Labs. v. Wilbar, 73 Dauphin 234 (1959). They are, accordingly dismissed as is the exception to the Decree Nisi.

The thrust of plaintiffs' argument as displayed in their brief, is simply (1) that energy that will flow over the line in question will have an interstate character and therefore the Federal Power Commission and not the Pennsylvania Public Utility Commission has jurisdiction over the condemnation of plaintiffs' land, and (2) the energy will, in part, be sold to other utilities and not to consumers of Philadelphia Electric Company, and therefore the Pennsylvania Public Utility Commission may not entertain the application for approval of the right of eminent domain to take plaintiffs' land.

Both of these arguments were fully considered by the Chancellor, discussed at length in his Adjudication, and rejected.

The facts clearly disclose that the line in question is within the franchised area of Philadelphia Electric Company; that it will be constructed by Philadelphia Electric; that it will be owned by Philadelphia Electric; that it will carry electric energy owned by Philadelphia Electric including its share of the Keystone Project as well as all of the energy generated at its Muddy Run Plant; that this energy will flow into the distribution system of Philadelphia Electric for the use of its Pennsylvania customers, including the plaintiffs; that the energy to be carried over this line is needed to supply its present and future demands for service.

The facts further clearly disclose that the construction of the line in question is for Philadelphia Electric's corporate use in the transmission and distribution of electrical energy to its customers in its franchised area.

We conclude that the Federal Power Commission has no jurisdiction here, that the Pennsylvania Public Utility Commission does have jurisdiction, and we adopt as the findings of fact and conclusions of law of the court, the findings and conclusions of the Chancellor, and finding no merit in any of plaintiffs' exceptions they should, accordingly, be dismissed and a final judgment entered.

We, therefore, enter the following

FINAL DECREE

And Now, this 27th day of December 1966, it is ordered, adjudged and decreed that the Adjudication of the Chancellor be and the same is hereby adopted as the opinion of the Court en Banc; the Findings of Fact and Conclusions of Law of the Chancellor are adopted as the findings of fact and conclusions of law of the Court en Banc. Each of plaintiffs' exceptions is dismissed and the Decree Nisi is affirmed and adopted as the final decree of the Court. The plaintiffs' complaint is dismissed at their cost, and judgment is entered in favor of the defendants and against the plaintiffs.

R. Dixon Herman
Judge

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 1 May Term, 1969
(Journal No. 63)

Appeal from the Order of the Superior Court at No. 21 March Term, 1967, affirming the Order dated January 10, 1966 of the Pennsylvania Public Utility Commission at Application Docket No. 92171, Application of Philadelphia Electric Company.

No. 92 May Term, 1967
(Journal No. 64)

Appeal from the Final Decree of the Court of Common Pleas of Dauphin County at No. 2721 Equity; No. 330 Commonwealth Docket, 1965, as certified to the Supreme Court by the Superior Court.

Charles S. Dunk and Bella M. Dunk,
Appellants

v.

Pennsylvania Public Utility Commission and Philadelphia Electric Company

J. Willison Smith, Jr. and Elizabeth K. Smith, his wife,
Appellants

v.

Pennsylvania Public Utility Commission and Philadelphia Electric Company

OPINION OF THE COURT

Roberts, J., Filed: April 23, 1969:

These two cases have taken different routes and stopped at different stations, but both have now come to the same resting place, presenting the same issues. *Dunk*, No. 1 May Term 1969, is an appeal from an order of the Superior Court, 210 Pa. Superior Ct. 183, 232 A. 2d 231 (1967); *Smith*, No. 92 May Term 1967, is an appeal from the decree of the Court of Common Pleas of Dauphin County, 85 Dauph. 106 (1966). In both cases, appellants challenge the authority of the Pennsylvania Public Utility Commission to approve the Philadelphia Electric Company's request to allow condemnation of a right of way for the construction and operation as part of the "Keystone Project" of a power line which will run in Pennsylvania from Peach Bottom, York County to a substation known as Whitpain in Montgomery County. Appellants are property owners along the proposed right-of-way. *Smith* has reached us by certification from the Superior Court; subsequently we granted allocatur in *Dunk*. We combined the cases for argument, and in this opinion we affirm the dispositions of the courts below.

Appellants first maintain that exclusive jurisdiction over the matter here in issue—the right to condemn land for the construction and operation of this high voltage line—is vested exclusively in the Federal Power Commission under the Federal Power Act, 16 U.S.C.A. §791 et seq. Section 824(a) notes that "the business of transmitting and selling electric energy . . . is invested with a public interest", but states also that federal regulation ex-

tends "only to those matters which are not subject to regulation by the States". Section 824(b), the section most heavily relied on by appellants, provides that the FPC "shall have jurisdiction over all facilities for such transmission or sale of electric energy [in interstate commerce] . . . ." Appellants argue that the power line involved in this case is a facility used in interstate commerce, and thus falls within the FPC's jurisdiction. We need not determine whether this line, which will run solely within Pennsylvania, but which arguably will be part of or an offshoot of an interstate network, is in interstate commerce within §824(b), because we agree with the courts below that in this situation, the FPC does not have jurisdiction over the *construction* of new facilities.

The Federal Power Commission Act aimed primarily at federal regulation of the interstate *sale* of electric energy. Connecticut Power and Light Co. v. FPC, 324 U.S. 515, 524, 65 S. Ct. 749, 753 (1945). Jersey Central Power and Light Co. v. FPC, 319 U.S. 61, 67, 63 S. Ct. 953, 956 (1943). Nowhere in the Act is there any indication that the FPC has jurisdiction over the construction of electric facilities, nor can appellants point to any case where the FPC has attempted to exercise such jurisdiction. One of the sponsors of the Act when it was before Congress testified that "we have . . . sought to make it as clear as language will that Congress does not in this case intend to regulate anything except interstate power, sold at wholesale". Hearings on H.R. 5423, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., at 1638. The only power of eminent domain mentioned under the Federal Power Act involves the explicit grant of the permissive, not exclusive, right given to the Com-

mission under 16 U.S.C.A. §814, which involves only waterways improvements. This indicates that had Congress intended the FPC to have jurisdiction in the situation before us—and we repeat that this conjecture runs contrary to precedent and statutory history—it would have explicitly said so. Compare Natural Gas Act of 1938, 15 U.S.C.A. §717(f) (requiring a certificate of public convenience from the FPC for the construction of facilities for the sale or transportation of gas by gas companies within the FPC's jurisdiction).

Appellants seem to argue that it would be wise for the FPC, in carrying out its duty to regulate the sale of power and the rates at which it is sold, to be able also to control the construction of power facilities. Apparently the FPC thought so too, since it proposed two bills, either of which would have given it exactly that power. See S. 2139, S. 2140, 89th Cong., 1st Sess. However, neither bill was passed by Congress, and this gives clear proof that under present law, the FPC does not have jurisdiction over the construction of the type of facility involved in these cases.

Appellants next argue that because the power line in issue is part of an integrated system that will convey power to other parts of Pennsylvania and to other states, the appropriation of appellants' property by the Philadelphia Electric Company is improper. Appellants rely on the Act of May 8, 1889, P. L. 136, as supplemented by Act of May 21, 1921, P. L. 1057, 15 P.S. §1182, which gives power companies the right "(b) To appropriate property, . . . for its corporate use in the construction, erection, operation, or maintenance of its buildings, machinery, apparatus, plants, works, equipment, and facilities for gen-

erating electric light, heat, and power, or any of them, for the transmission or distribution thereof . . . ." The statute goes on to require the P.U.C. to make a finding, after hearing, that the appropriation is for the public convenience and necessity.

Appellants claim that because the power line which they attack is part of a system that will provide energy to other than the Philadelphia Electric Company area, the appropriation is not for the company's "corporate use" within the statute. We agree with the courts below that the statute should not be read so narrowly. The chancellor in the *Smith* case found as a fact, on a record that supports his finding, that the primary purpose of the entire Keystone Project "is to take care of substantial deficiencies in generating capacities of intervening defendant", and that the primary purpose of the Peach Bottom-Whitpain line "is to transmit the additional energy required by Philadelphia Electric to supply the needs of its electric customers". 85 Dauph. at 117. We believe that a primary "corporate use", as this record discloses, is sufficient and that the statute does not require that the appropriation be for the *sole* corporate use of the condemning company. See Stone v. P.U.C., 192 Pa. Superior Ct. 573, 162 A. 2d 18 (1960); Laird v. P.U.C., 183 Pa. Superior Ct. 457, 133 A. 2d 579 (1957); Phillips v. P.U.C., 181 Pa. Superior Ct. 625, 124 A. 2d 625 (1956). In light of the contemporary complexity and interdependence of electrical systems, appellants' position is untenable.

Finally, appellants Dunk (although apparently not appellants Smith) contend that the proposed right-of-way would create an unreasonable hazard. We agree with the Superior Court, which fully and adequately disposed of

this issue, that this decision was within the Commission's discretion, and that there are adequate facts on the record to support the Commission's determination. West Penn Power Co. v. P.U.C., 199 Pa. Superior Ct. 25, 184 A. 2d 143 (1962), in which the Commission's refusal to grant a right-of-way as being too hazardous, is, as the Superior Court correctly points out, factually distinguishable and in any event supportive only of the proposition that this decision is for the Commission's determination, which will not be overturned absent an abuse of discretion.

In *Dunk v. P.U.C.*, No. 1 May Term 1969, the order of the Superior Court is affirmed.

In *Smith v. P.U.C.*, No. 92 May Term 1967, the decree of the Court of Common Pleas of Dauphin County is affirmed, each party to pay own costs.

Mr. Justice Cohen dissents.

APPENDIX C

SUPERIOR COURT OF PENNSYLVANIA
Harrisburg District

Harrisburg 17120

March 21, 1967

Bayard M. Graf, Esquire
2124 Philadelphia National Bank Bldg.
Philadelphia, Pa. 19107

Re: J. Willison Smith, Jr. et ux. v. Pa. P.U.C. and Phila. Electric Co., No. 95 March Term, 1967

Dear Mr. Graf:

The Court has entered the following Order in the above entitled proceeding:

"And Now, March 17, 1967, appeal No. 95 March Term, 1967 is now certified to the Supreme Court for hearing and disposition at the cost of the appellants.

Per Curiam

Watkins, J., dissents.

Note: Under the Act of August 14, 1963, P. L. 819, 17 PS §191.4, the Superior Court has no jurisdiction of actions and proceedings in equity. All appeals from any judgment, order or decree of a lower court in an action in equity must be taken directly to the Supreme Court. The Act of 1963 provides that 'All

other acts or parts of acts inconsistent with this act are repealed.' Therefore any prior inconsistent provisions were repealed by this act."

Pursuant to said Order, the appeal has been certified to the Supreme Court at *No. 92 May Term, 1967,* and will be listed for argument *during the Harrisburg Session commencing May 22, 1967.*

I enclose invoice in the sum of $12.00, covering the certification fee, check for which should be made payable to the Prothonotary of the Supreme Court.

All paper books in this case must reflect the caption, term and number in the Supreme Court.

Very truly yours,
Charles A. Hoenstine
Prothonotary

CAH:lel

LIBRARY
SUPREME COURT, U. S.

FILED
AUG 11 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 350

J. WILLISON SMITH, JR. and
ELIZABETH K. SMITH, His Wife

v

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and
PHILADELPHIA ELECTRIC COMPANY

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 350

J. WILLISON SMITH, JR. and
ELIZABETH K. SMITH, His Wife

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and
PHILADELPHIA ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Pet. App. B. pp. 54-59) is reported in 434 Pa. 41, 252 A(2) 589 (1969). The Adjudication and Decree Nisi of the Chancellor of the Court of Common Pleas of Dauphin County sitting as the Commonwealth Court (Pet. App. B, pp. 24-42) is reported in 85 Dauph. 106 (1966). The Final Decree of the Court en banc of the Court of Common Pleas of Dauphin County (Pet. App. B, pp. 42-53) is reported in 86 Dauph. 376 (1966).

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on April 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania acted correctly in affirming the decree of the Court of Common Pleas of Dauphin County holding that the Pennsylvania Public Utility Commission has jurisdiction over an application by Philadelphia Electric Company for exercise of its power to appropriate property for the construction of the electric transmission line here involved and that the Federal Power Commission does not have jurisdiction over the *construction* of this electric transmission line?

STATUTE INVOLVED

The statutory provisions involved are Part II of the Federal Power Act, Section 201(b), 16 U.S.C. Section 824 (b) [Pet. App. A, p. 23] and Sections 201-209 thereof, 16 U.S.C. Sections 824-824h.

STATEMENT

This case arose out of an action in equity brought in the Court of Common Pleas of Dauphin County, Pennsylvania by J. Willison Smith, Jr. and Elizabeth K. Smith, his wife (hereinafter "Smiths"), against the Pennsylvania Public Utility Commission (hereinafter "Commission") under Section 1111 of the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended (66 P.S. 1441). Under this Section the Dauphin County Court is clothed with exclusive jurisdiction of all proceedings for injunctions where the jurisdiction of the

Commission is questioned. Philadelphia Electric Company (hereinafter "Philadelphia Electric") intervened and became a party to this action.

The relief sought by the Smiths was an injunction prohibiting the Commission from exercising jurisdiction over an Application filed with it by Philadelphia Electric, an electric utility subject to its jurisdiction, for approval of the exercise of the right of eminent domain in acquiring a right of way for the construction, operation and maintenance of a line for the transmission and distribution of electricity over and across a tract of land in Worcester Township, Montgomery County, Pennsylvania, owned by the Smiths. The Application was filed under the provisions of the Pennsylvania Act of Assembly of May 8, 1889, P.L. 136, as amended and supplemented by the Act of May 21, 1921, P.L. 1057 (15 P.S. 1182) (hereinafter "Act of 1921").

Under the Act of 1921, power is conferred upon an electric utility to appropriate property necessary for its corporate use in the construction, erection, operation or maintenance of its buildings, machinery, apparatus, plants, works, equipment and facilities for generating electric light, heat and power for transmission or distribution, provided that before any such company shall exercise the power, the Public Utility Commission, upon application shall find and determine after public hearing that the service to be furnished by the utility through the exercise of the power is necessary or proper for the service, accommodation, convenience or safety of the public.

The Smiths' Complaint in Equity challenged the jurisdiction of the Commission upon grounds that the Commission had no jurisdiction under the Act of 1921. The substance of Smiths' averments then were that Philadelphia Electric was not seeking to appropriate property necessary for its corporate use under the legislative grant of 1921, but was seeking to condemn Smiths' land as part

of a project known as the "Keystone Project", and for the benefit of other utilities both within and without the Commonwealth of Pennsylvania. At the hearing the Smiths injected the jurisdiction of the Federal Power Commission for the first time, contending that under Part. II of the Federal Power Act the Federal Power Commission (hereinafter "FPC") has sole and exclusive jurisdiction.

Both Philadelphia Electric and the Commission urged before the Dauphin County Court and the Supreme Court of Pennsylvania that there is nothing in Part II of the Federal Power Act granting Federal jurisdiction over the *construction* of electric facilities. The Pennsylvania Courts sustained Philadelphia Electric and the Commission in their contentions holding that the FPC under Section 824(b) of the Federal Power Act does not have jurisdiction over the construction of new facilities. The Pennsylvania Supreme Court stated that it need not determine whether this line is in interstate commerce within Section 824(b), because it agreed with the *courts below* that in this situation the FPC does not have jurisdiction over the *construction* of new facilities. (Pet. App. B, p. 56)

It is to be noted that this decision of the Supreme Court of Pennsylvania affirmed not only the Dauphin County Court in the Smiths' case but also the Commission and the Superior Court of Pennsylvania in *Charles S. Dunk and Bella M. Dunk* v. *Pennsylvania Public Utility Commission and Philadelphia Electric Company* where the same issue as to FPC jurisdiction was presented. (Pet. App. B, pp. 54-55 and 59) The Superior Court's decision in *Dunk* is reported at 210 Pa. Superior Ct. 183, 232 A (2) 231 (1967). The cases were combined for argument, and the Supreme Court of Pennsylvania affirmed the dispositions of the courts below both on the FPC issue and on all other issues in upholding Philadelphia Electric's right of condemnation. (Pet. App. B, pp. 57-59)

ARGUMENT

Points of Fact: The Keystone Project involved the construction of a steam electric generating station in the heart of the bituminous coal region of western Pennsylvania in Armstrong County, so that electric energy could be generated at the site of a coal mine and transmitted from that point to the service areas of the participating companies. (R. 66a) Seven electric companies participated: Atlantic City Electric Company, Baltimore Gas and Electric, Delaware Power & Light, New Jersey Public Service Electric and Gas, Philadelphia Electric, Pennsylvania Power & Light and Jersey Central Power & Light; and they own the station as tenants in common. (R. 67a-70a)

In the case of Philadelphia Electric it receives its share of the electric energy from the Keystone Generating Station at its Peach Bottom substation located in York County, Pennsylvania. From Peach Bottom, Philadelphia Electric constructed a 500 KV line to its Whitpain substation in Montgomery County, Pennsylvania.

It is this 500 KV line from Peach Botton to Whitpain which is involved in this proceeding and its construction required the condemnation of the Smiths' property. Its primary purpose was to make up the energy deficiency of Philadelphia Electric in 1967 and 1968 for its own customers and enable it to maintain service to its customers. (R. 63a; 89a-90a) Once the energy generated in Armstrong County reaches Philadelphia Electric's Peach Bottom substation, all of the energy passing over the 500 KV line from Peach Bottom to Whitpain is Philadelphia Electric energy and transmitted by Philadelphia Electric within Philadelphia Electric's service area for distribution to and utilization by Philadelphia Electric's customers. (R. 61a-63a) The Smith property is in Philadelphia Electric's service area and is served by Philadelphia Electric. (R. 73a)

Thus the line herein question was not constructed primarily for the purpose of interconnecting pool arrange-

ments, although it may at times be used for that purpose. It is common practice for electric companies throughout the United States to enter into interconnecting pool arrangements.* It is recognized that power pools result in more economical and more dependable service to the customers of each participating company. (R. 74a-75a)

Philadelphia Electric initially endeavored to negotiate with the Smiths for a right-of-way over their property but was unsuccessful. (R. 14a) As a result, Philadelphia Electric filed its application with the Pennsylvania Public Utility Commission requesting a finding of necessity for the service so that it might exercise its power of eminent domain. (R. 12a-15a) Thereafter the Smiths instituted their action to contest the Commission's jurisdiction. The Keystone Generating Station has been put into operation, and the 500 KV line involved in this proceeding has been constructed by Philadelphia Electric and put into service. At no time during the course of this litigation has there been any stay of the eminent domain proceeding. For all practical purposes the only matter left for determination between the Smiths and Philadelphia Electric is the amount of damages the Smiths should be paid for the right of way condemned.

Points of Law: The Smiths contend that the FPC has exclusive jurisdiction over all facilities for the transmission of electric energy in interstate commerce. Ergo, the FPC has jurisdiction over the *construction* of electric transmission lines. They are in error in the following respects: (1) in their refusal to recognize that Part II of the Federal Power Act does not give the FPC jurisdiction over the *construction* of an electric transmission line, even though it may be used in interstate commerce; and (2) in their complete misconception of the holdings in the cases they cite involving the Federal Power Act.

* Agreements concerning interconnecting pool arrangements are subject to and filed with the FPC including the interconnection agreement covering this line.

(1)

The Smiths rely upon Section 201(b) of the Federal Power Act (16 U.S.C. 824(b)) for their argument. It defines the scope of the FPC's jurisdiction as follows:

> "(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exploration of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

For their proposition that the FPC has exclusive jurisdiction the Smiths rely upon that portion of the second sentence of the above section beginning with: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy . . . ." The Smiths erroneously interpret this as an all-inclusive provision. The first clause of the section, however, reads: "The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce". The scope of the Commission's jurisdiction thus is limited. Regulation is expressly confined to the authority contained in those "specific" sec-

tions of the Act, i.e., sections 824-824h. These sections cover (a) interconnections and coordination of facilities, (b) disposition of property, (c) issuance of securities, (d) and (e) rates and charges, (f) adequacy of service, (g) cost of property and depreciation and (h) joint boards. *These are the subjects of Commission jurisdiction. Nowhere under the Federal Power Act is jurisdiction conferred upon the Federal Power Commission over the construction of transmission facilities.*

(2)

The Smiths have cited a number of cases involving the Federal Power Act, but they have not cited a single case where the FPC under Part II of the Federal Power Act exercised jurisdiction over the *construction* of electric transmission lines.

In *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U.S. 61, 87 L.Ed. 1258, 63 Sup. Ct. 953 (1943) it was found that Jersey Central Power & Light owned and operated facilities used in the interstate transmission of electric energy in enforcement of the "securities" provisions of Part II of the Federal Power Act.

The following cases involved the "accounting" requirements of the FPC under Part II of the Federal Power Act: *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F(2) 953 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 89 L.Ed. 1150, 65 Sup. Ct. 749 (1945); and *Federal Power Commission* v. *Arizona Edison Co., Inc.,* 194 F(2) 679 (1952).

In all three cases the assertions of jurisdiction by the Federal Power Commission were to regulate accounting practices on the basis that because of a sale at wholesale in interstate commerce in the *Hartford* case and the transmission of electric energy in interstate commerce in the

Connecticut and *Arizona* cases, these companies were public utilities as defined in the act and therefore subject to its "accounting" regulations.

Federal Power Commission v. *Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed. (2) 638, 84 Sup. Ct. 644 (1964) involved sales at wholesale in interstate commerce, and was under Part II of the Federal Power Act relating to the FPC's jurisdiction over "rates and charges".

Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F(2) 608 (1965) involved Part I of the Federal Power Act which deals with the use of navigable waters in the development of hydro-electric power projects. Under Part I of the Federal Power Act authority is conferred upon the FPC to issue licenses for the construction of hydro-electric projects (16 U.S.C. 797(e)), and the right of eminent domain is conferred upon a determination of necessity by the FPC (16 U.S.C. 814). No such power to license or to condemn property is conferred under Part II of the Federal Power Act.

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.Ed. 268, 70 Sup. Ct. 266 (1950) has no application here. It arose under the Natural Gas Act of 1938 (15 U.S.C. 717 f). The real significance of this case lies in the Natural Gas Act itself. Under this Act a certificate of public convenience must be obtained from the FPC for the construction and operation of facilities for the transportation or sale of gas by a natural gas company in interstate commerce subject to its jurisdiction. Furthermore, power of eminent domain is granted by this Act.

Obviously, the cases cited by the Smiths furnish no basis of authority for their argument that the FPC has jurisdiction over the *construction* of electric transmission lines. Being a creature of statute, the FPC has only those powers conferred by statute: *New York Public Service*

Commission v. *Federal Power Commission*, 257 F(2) 717 (1958).

Part I of the Federal Power Act and the Natural Gas Act, supra, make it plainly evident that Congress where it wanted the FPC to have jurisdiction over *construction* specifically gave it such jurisdiction.

The Smiths' test "of whether electric transmission lines fall within the jurisdiction of the Federal Power Commission is whether or not such lines are used in the transmission of interstate power and are not facilities used in local distribution" (Pet., p. 15), has no application here. Whether Philadelphia Electric owns and operates facilities used in the interstate transmission of electric energy may be a sufficient basis for a determination that it is a public utility as defined in the Federal Power Act and within the jurisdiction of the FPC. However, the scope of FPC jurisdiction over such a public utility is another matter entirely. The exercise of the FPC's regulatory powers must be within those spelled out in sections 824-824th of the Statute. Since no jurisdiction has been conferred upon the FPC over the construction of electric transmission lines, no determination in this case is necessary as to whether the line in question is a facility for the transmission of electric energy in interstate commerce, or for that matter, a facility used in local distribution. The Pennsylvania Supreme Court made this clear when it said: "*We need not determine whether this line, which will run solely within Pennsylvania, but which arguably will be part of or an offshoot of an interstate network, is in interstate commerce within Section 824(b), because we agree with the courts below that in this situation, the FPC does not have jurisdiction over the construction of new facilities.*" (Pet. App. B, p. 56)

Other reasons cited by the Smiths in their argument that the FPC has jurisdiction go to reasons why the FPC *should* have jurisdiction. They assert that Federal rate

control is impaired by lack of FPC jurisdiction over *construction.* This is not so, as the FPC has no jurisdictional deficiency in regulating sales at wholesale in interstate commerce. They also assert that state jurisdiction over electric transmission lines in general is inadequate. This assertion is recklessly made and without record support. The reference to the Federal highway program is completely without merit and has no application here.

What the Smiths seek is FPC jurisdiction over the construction of electric transmission lines used to transmit electric energy in interstate commerce. This can only be obtained through congressional action. Senate Bills 2139 and 2140 were introduced in the 89th Congress by the FPC itself, so as to extend FPC jurisdiction over the construction of electric transmission lines but they died in the 89th Congress. The Pennsylvania Courts properly commented that the FPC's lack of jurisdiction in this case is further indicated by those proposed Amendments to the Federal Power Act. (Pet. App. B, pp. 29, 57) (The Congressional Record and Senate Bills 2139 and 2140 were printed as part of the record in this case at R. 158a—170-½a.)

The simple answer to all of the Smiths' arguments is that no jurisdiction has been conferred upon the FPC over the construction of electric transmission lines. The Superior Court of New Jersey (Appellate Division) characterized the argument that the FPC has jurisdiction as "frivolous" saying:

> "Appellant's argument that the Board may have been without jurisdiction in this case is frivolous. It seems to contend that the Keystone Project involved the sale of electric energy in interstate commerce and consequently falls under the jurisdiction of the Federal Power Commission by reason of 16 U.S.C.A., § 824(b). This argument misconceives the purposes of

> the present proceeding, which was to determine whether Public Service could exercise its power of eminent domain on property it was unable to acquire by agreement of the owners. The federal enactment contains no provision empowering the Federal Power Commission to grant the authorization sought in this action by Public Service. That statute concerns rates, consolidations, purchase of securities, issuance of securities, etc.—none of which is involved here. This is no conflict between state and federal law. The Board has jurisdiction:" *"In re Petitions of Public Service Electric and Gas Company; and Appeal of Citizens Opposed to Power Towers, Readington Chapter, Inc. v. Public Service Electric and Gas Company and Board of Public Utility Commissioners of the State of New Jersey,* 100 N. J. Sup. 1, 241 A(2) 15, 23 (1968)."

It is to be noted that this case involved the construction of a 500 KV transmission line which is part of the same Keystone project involved herein and was constructed by one of the participants in said Project.

In *Pacific Power & Light Co.* v. *Federal Power Commission,* 184 F. (2) 272 (1950), an effort was made to construe Part I of the Federal Power Act as granting jurisdiction to the FPC over the construction of a transmission line which was not a part of the "project works" of a hydro-electric project. The Court refused to do so and concluded its opinion by stating:

> "We have said before, and we say again, that the houses of Congress and their committees are as readily available for these purposes as are the courts." (P. 275)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for respondent
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SUPREME COURT, U. S.

FILED
AUG 12 1969
JOHN F. DAVIS, CLERK

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October Term, 1969
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J. WILLISON SMITH, JR. and ELIZABETH K. SMITH, His Wife,
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Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN OPPOSITION

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16 U.S.C.A. §824(a), (b), (g) 12, 13
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

– No. 350

J. Willison Smith, Jr. and Elizabeth K. Smith, His Wife,

Petitioners

v.

Pennsylvania Public Utility Commission and Philadelphia Electric Company,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF FOR RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN OPPOSITION

JURISDICTION

Petitioner states that the federal question sought to be reviewed here is the sole and exclusive jurisdiction of the Federal Power Commission (FPC) "over

interstate high voltage electric transmission facilities".

Respondent, Pennsylvania Public Utility Commission (Pa. P.U.C.) does not deny such FPC jurisdiction over *existing* lines (facilities) transmitting bulk electricity in interstate commerce. But such line (facility) does not exist until it is ready and capable of such use. It does not exist until it exists. It does not exist until it is constructed. It cannot be constructed until a suitable right-of-way is procured. Such procurement is often feasible only by the exercise of the power of eminent domain. Such power to condemn land in Pennsylvania, in the subject circumstances (for transmission of electric power) is granted to certain corporations by the Act of May 8, 1889, P. L. 136, as amended, 15 P.S. §1182 (now 15 P.S. §3272), but the right cannot be exercised unless and until the Pa. P.U.C. has found that the proposed exercise "is necessary or proper for the service, accommodation, convenience or safety of the public". This fundamental requirement must be met regardless of whether the proposed line is expected to be used in interstate or intrastate transmission.

Thus, a line ready to transmit electricity is a "facility" therefor. But a pre-condemnation inquiry as to the necessity for condemnation is a far cry from a "facility" used for, or capable of transmitting electricity anywhere.

Petitioners would confuse the issue at hand (a pre-condemnation finding of necessity for condemning right-of-way for a proposed line) by repeatedly referring to an existing line ready and capable of transmitting electricity.

FPC does not have, has not claimed, and in fact has *dis*claimed jurisdiction to authorize such type of condemnation. It is the petitioners who contend that FPC *should* claim jurisdiction, and the claim of federal involvement is the claim of petitioners alone.

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania acted correctly in affirming the decree of the Court of Common Pleas of Dauphin County (sitting as Commonwealth Court) holding that the Federal Power Commission had no jurisdiction in the matter (authorizing the exercise of the power of eminent domain granted under state law, to obtain right-of-way for electric transmission line) and that the Pennsylvania Public Utility Commission has such jurisdiction?

STATEMENT

Respondent believes that it is of the utmost importance to bear in mind that the matter here in issue is NOT the transmission line *now* in existence and traversing petitioners' land, but rather a *pre-condemnation* application proceeding filed with the Pennsylvania Public Utility Commission (Pa. P.U.C.) by Philadelphia Electric Company on April 4, 1965, and docketed A. 92227.

The line *now constructed* may be the subject of regulation by the Federal Power Commission (FPC). But that is not the issue here. The application proceeding filed with and processed by Pa. P.U.C. was essentially an in rem, eminent domain proceeding, over which the FPC does not have and has not claimed jurisdiction. In fact the FPC has *dis*claimed jurisdiction to authorize such condemnation.

The following history is pertinent:

(a) On April 4, 1965, Philadelphia Electric Company (hereinafter, PE) filed its application, docketed A. 92227, with the Pennsylvania Public Utility Commission (hereinafter, Commission), for a finding of necessity for its proposed 500 KV electric tower line across the property of Smiths, petitioners herein. The Commission scheduled hearing for June 25, 1965.

(b) On June 23, 1965, Smiths filed their complaint in the Court of Common Pleas of Dauphin

County (sitting as Commonwealth Court) seeking a preliminary and final injunction enjoining construction of the line across the Smith property, and enjoining the Commission from proceeding further with the application pending before it.

(c) On June 24, 1965, Commonwealth Court, after hearing and argument, denied the requested preliminary injunction.

(d) On August 9, 1965, the Commission by order reported in 42 Pa. P.U.C. 379, denied Smiths' motion to dismiss the Application for lack of jurisdiction in the Commission and for lack of authority in the electric company to condemn in this case.

(e) On March 21, 1966, Commonwealth Court, after hearing and argument, issued its adjudication and order nisi, reported in 85 Dauphin 106, upholding the jurisdiction and authority of the Commission. Smiths filed exceptions thereto.

(f) On March 28, 1966, the Commission approved PE's application docketed A. 92227. This approval was granted over Smiths' objections that the Commission lacked jurisdiction of the subject matter, and that the applicant was unlawfully seeking to condemn for an improper purpose. Smiths appealed the order to the Pennsylvania Superior Court at No. 30 March Term, 1967, and the appeal was listed for argument at the session commencing June 13, 1966, at Philadelphia.

(g) Upon request, the Superior Court granted continuance to the session commencing December 12, 1966.

(h) On November 22, 1966, the Superior Court denied a request for a further continuance.

(i) On December 12, 1966, Smiths withdrew and discontinued their appeal at No. 30 March Term, 1967. See (f) above. It will be noted that although Smiths withdrew and discontinued that appeal, they now make averments (Pet., p. 21) unsupported by any record here.

(j) On December 27, 1966, Commonwealth Court dismissed Smiths' exceptions and affirmed and adopted the chancellor's findings, conclusions, and decree, referred to in paragraph (e) hereinabove.

The appeal from that decree to the Supreme Court of Pennsylvania, which affirmed the decree, is the basis of the present petition.

It is to be noted that this decision of the Supreme Court of Pennsylvania not only affirmed the Dauphin County Court in the Smith case, but the Superior Court of Pennsylvania and the Commission in *Charles S. Dunk and Bella M. Dunk v. Pennsylvania Public Utility Commission and Philadelphia Electric Company* where the same issues of state versus federal jurisdiction were presented. *Dunk* is reported at 210 Pa. Superior Ct. 183, 232 A. (2) 231 (1967). Both cases were combined for argument and the Supreme Court of Pennsylvania affirmed the dispositions of the courts below both on the FPC issue and on all other issues in upholding Philadelphia Electric's right of condemnation in this case.

ARGUMENT

The petition for certiorari should not be granted for the following reasons:

1. Petitioners have not requested a stay because the electric transmission line which was proposed has been constructed by, lawful entry upon petitioners' land condemned by the electric company, leaving condemnees to their right to damages. The condemnation being unstayed, and the line having been constructed and placed in use, petitioners' case is moot.

2. Eminent Domain has traditionally been a local matter, controlled by the states, and Congress has invaded the area with great reluctance and only in the most compelling circumstances. Such invasion should never be implied. The Federal Power Act contains no provision for condemning property required for a transmission line such as is here involved because Congress recognized the adequacy of state laws for that purpose. This is true regardless of whether the line is for intrastate or interstate transmission.

3. Petitioners have not presented any new and substantial federal question. The absence of a substantial federal question here is strongly indicated by the fact that petitioners have been unable (or they have been unwilling to attempt) to convince the Federal Power Commission that any federal question is involved here.

Petitioners urge (1) that regulation of the *existing line* is a matter in the exclusive competence of FPC; and (2) that the pre-condemnation application proceeding filed with Pa. P.U.C. involved land (right-of-way) required for the construction of an electric transmission line which may be used for the interstate transmission of electricity, and (3) that the cost of such land, being a matter which would ultimately be reflected in the cost of electricity to be transmitted over it, is also a matter over which the FPC should have (and does have) exclusive jurisdiction.

Whether the transmission line *which now exists* is a "facility" in the exclusive competence of the FPC is a matter entirely separate from the issue involved in this *eminent domain* proceeding.

Historically, the reluctance of the federal government to intrude upon the states' laws and procedures for condemning land within their borders is amply reflected in the development of Rule 71A of the Federal Rules of Civil Procedure, 28 U.S.C.A., governing condemnation of property.

> "In the early days of our history to avoid the fears concerning the national government, Congress relied on *purchase, cessation from state* governments, or condemnation in a *state* court and by authority of a *state* statute for the acquisition of lands outside the District of Columbia."

This was for acquisitions by or on behalf of *the United States itself.* This attitude is reflected in Title 74 of Purdon's Pennsylvania Statutes Anno-

tated, Sections 1 et seq., and especially Section 17, reading:

> "§17. Condemnation Proceedings.
>
> In case the United States shall decide to resort to condemnation in acquiring land for the purposes specified in the first and second sections of this act [to improve navigation facilities] the United States shall, in all respects, be governed by the laws of this state regulating the appropriation of private property for public use, and said laws are hereby made applicable: . . ."

Under the present *Federal Power Act*, Title I (concerning *navigable waters*), 16 U.S.C. §814, it is provided:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a *waterway or waterways* for the use or benefit of interstate or foreign commerce, it *may* acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the

United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the *State* where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, §21, 41 Stat. 1074." (Emphasis added).

It will be noted (1) that such license concerns "waterways"; (2) that the federal power to condemn "may" be exercised, if necessary; and (3) that "The practice and procedure in any action or proceeding for that purpose . . . shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated".

The practice and procedure in Pennsylvania is governed by the *"Eminent Domain Code"*, Title 26 Purdon's Pennsylvania Statutes Annotated.

The power of eminent domain provided under Part I of the Federal Power Act was evolved in order that the needed improvement of navigable waterways be not impeded by either the statutory action or statutory inaction of the states. Where such *waterways* are concerned the FPC may prosecute anyone acting without a federally required license.[1] It may seek a restraining order and restoration of the status quo.[2]

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[1] 16 U.S.C.A. §817.

[2] *U. S. v. Appalachian Electric Power Co.*, D.C. Va., 1938, 23 F. Supp. 83, reversed on other grounds, 61 S. Ct. 291, 311 U.S. 377, 85 L. Ed. 243, rehearing denied 61 S. Ct. 548, 312 U.S. 712, 85 L. Ed. 1143, petition denied 63 S. Ct. 67, 317 U.S. 594, 97 L. Ed. 487.

It may order a violator to apply for a federal license. And it has done all of these things.

A licensee under Part I of the Federal Power Act, if qualified to condemn land under both the state and federal law, *may proceed to do so under either one.* If there is no state law, or if it is inadequate to the purpose, or if it is obstructive, the federal power to condemn will remove the impediment by superseding it.[3] But if the power granted by the state is adequate to the purpose, and permits the acquisition of an estate equal or superior to that obtainable under federal law, then there is no requirement that the condemnor must resort to the federal power to condemn. *Alabama Power Co. v. Gulf Power Co.*, D.C. Ala., 1922, 283 F. 606 (1922); *Superintendent of Public Works v. Paonesso*, 1958, 182 N.Y.S. 2d 223, 14 Misc. 2d 787.

So much for the power to condemn provided under Part I of the Federal Power Act. *No other power to condemn is provided for any other purpose or under any other portion of the Act.*

Section 824(a) and (b) under Part II of the Federal Power Act (16 U.S.C.A. §824), gives the FPC the power to regulate the *transmission* and *sale* of electric energy *being transmitted and sold* at wholesale in interstate commerce. Obviously, there can be no such transmission and sale until there are *existing facilities therefor.* When the FPC asserts jurisdiction over such transmission and sale it may then "ascertain" the "actual" cost of the property in-

[3] *Alabama Power*, infra; *Superintendent of Public Works v. Paonesso*, infra.

volved, and other elements entering into the rate-making process (16 U.S.C. §824g). But "actual" cost cannot be "ascertained" until it has become *actual.* Nor does the mere fact that a particular pre-production cost will ultimately affect the cost to the ultimate consumer thereby give the FPC the power to *dictate* what such cost *shall be,* rather than to *ascertain* what it *was.* Such *pre*-production cost is not a "facility" for the transmission or sale of electric energy anywhere. Petitioners would ignore the express limitations of the Federal Power Act. But in *Addison v. Holly Hill Fruit Producers, Inc.,* cited by petitioners, the Court (per Mr. Justice Frankfurter) said, 64 Supreme Court 1215, at page 1221, "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. *But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.*" (Emphasis supplied).

Connecticut Light and Power, cited by petitioners, was a case in which the FPC *asserted* jurisdiction, and it concerned accounting practices involved in the transmission and sale of electric energy over *existing* facilities. Yet the Court pertinently observed (65 Supreme Court 749, at 756) [Technologically]:

> "Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state."

But the Court did not find such test persuasive. If this apt comment may be made of a toaster which is *plugged in* to an *existing* system, what may be said of a toaster that not only is not plugged in but is nothing more than a drawing in the blueprint stage?

In *Clemmer v. Pennsylvania Public Utility Commission,* cited by petitioners, the Court affirmed the very powers which petitioners here would seek to negate.

In all the remaining cases cited by petitioners the Federal Power Commission was a party, either plaintiff or defendant. In the *Scenic Hudson* case the FPC had granted a license for the construction of *a hydroelectric project affecting navigable waters* (a matter over which the FPC had unquestioned jurisdiction to issue such a license). The Court held that the license was improvidently issued, and remanded the matter for further consideration. But in the instant case the FPC has not seen fit to become a party. And in a case similar to the instant case (non-hydroelectric), the FPC *disclaimed jurisdiction to issue such a license: Pacific Power & Light Co. v. Federal Power Commission,* C.A., 1950, 184 F. 2d 272, 87 U.S. App., D.C. 261 (1950).

In the cases cited by petitioners the FPC was concerned with accounting practices involved in the actual transmission and sale of electric energy over *existing facilities therefor.*

Clearly, Congress has not authorized the issuance of a license to condemn property under Part II of the Federal Power Act, but it has authorized the FPC to regulate the sale of energy transmitted over inter-

state lines. Congress must have realized that the lines necessary for such transmission were being constructed *without any necessity for additional power to condemn.*

> "[The] purpose and scope [of the Federal Power Act] is fairly stated, though in general terms, in the title:
>
> 'An act to create a federal power commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.' "

Alabama Power Co. v. Gulf Power Co., supra.

Keeping these purposes clearly in mind, Part I of the act provides for the issuance of licenses and the power to condemn land to protect and promote the use of navigable waters for navigation and for hydroelectric power production, based, naturally, upon the importance of *waterways*, and the *nature* of water (involving multi-state flooding or flow-through). For these reasons, the *augmentive* power to condemn land is provided in Part I of the Federal Power Act, to protect and enhance *waterways*. There is no comparable provision under any other part of the Act. Even under Part I of the Act, the power of condemnation provided under state law is preserved to the fullest, consistent with the federal purpose. The state law is not unconditionally ousted. *Alabama Power Co. v. Gulf Power Co.*, supra; *Superintendent of Public Works v. Paonesso*, supra.

Though the Federal Power Act has long been in effect, petitioners have been unable to cite a single case suggesting that any federal authority is either necessary or available for the right to condemn land for an electric transmission line such as is here involved. On the contrary, even where (as under Part I) such right is provided, the intention is clear that *state* practices and procedures shall continue to control.

A strong analogy is presented by the fact that, under the Pennsylvania Public Utility Law, Title 66 of Purdon's Pennsylvania Statutes Annotated, the Pennsylvania Public Utility Commission is given (66 P.S. §§1179 to 1181) exclusive authority to condemn land required for rail-highway crossing facilities which *usually carry trains in interstate commerce,* yet no one has ever contended that such power is superseded by federal law.

Petitioners protest that others will share in the proposed "pooling benefits" and that their constitutional rights are violated. These objections are thoroughly answered in *Alabama Power Co.,* supra.

The contention that the rule of strict construction should bar the condemnor's right here was similarly raised and answered in *Toler v. Pa. P.U.C.,* 185 Pa. Superior Ct. 222, 228 (1958), where the Court said:

> "Appellants first contend that a statute conferring the right of eminent domain on a private corporation should be strictly construed. Appellees agree with this proposition, and we are satisfied that it sets forth a well-settled rule of construction in Pennsylvania. See Section 58 of the

Statutory Construction Act of 1937, P. L. 1019, 46 P.S. 558; Lance's Appeal, 55 Pa. 16; Pagni v. Commonwealth, 179 Pa. Superior Ct. 213, 116 A. 2d 294. However, the judicial interpretation of the term 'public use' in our state has not been circumscribed by mere legalistic formulas or philological standards: Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834.[3] The Act of 1921 provides for the appropriation of property necessary for the Company's corporate use. . . .

"Rarely, if ever, will a taking upheld by the state court be disturbed by the Supreme Court." Vol. 7, *Moores Fed. Practice*, p. 2714.

Petitioners' contention that since the cost of the land to be condemned will affect the ultimate rate to the consumer the FPC should regulate such land acquisition, is pointedly answered as follows in *Grand River Dam Authority v. Grand-Hydro*, Okla. 1948, 69 S. Ct. 114, 335 U.S. 359, 93 L. Ed. 64, rehearing denied 69 S. Ct. 298, 335 U.S. 900, 93 L. Ed. 435:

"It *may* be that, at some *later* date when the petitioner, as a federal licensee, shall be ready to *sell* power, the Commission or other appropriate body will *then* give consideration to *the value to be allowed for this land in the petitioner's*

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[3] And see Ohio Power Co. v. Deist, 154 Ohio St. 473, 96 N.E. 2d 771, wherein it was held that the construction of a statute delegating authority to exercise the right of eminent domain must not be so strict as to be unreasonable or stained."

rate base. There is, however, *nothing* in the Federal Power Act that purports to prescribe *the price which a purchaser of land may pay voluntarily and in good faith for land which it later incorporates into a project,* . . .

* * * * * * *

As to the question whether the Federal Power Act should be interpreted as *actually superseding the state law of condemnation and as restricting the measure of valuation* which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is *nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws.*" (Emphasis added.)

"There also has been a suggestion made of the possible materiality in this case of those provisions of the Federal Power Act which relate to the price to be paid by the United States in the event that it takes over the project of a licensee upon or after the expiration of a federal license. The issues raised by that suggestion are comparable to those just discussed in relation to the rate base of a federal project, except that such a recapture of the project is even more remote than the determination of a rate base for the computation of rates to be charged for its product. We accordingly express no opinion upon the issues which may arise when, as and if the above-mentioned proceedings may be taken."

Four justices joined in a dissent based solely on the objection that the condemnee was permitted to recover the value of *running water power,—an element completely absent from the instant case.*

As already observed in *Superintendent of Public Works v. Paonesso,* supra, a licensee is free to use its state power of eminent domain, unless the federal control of navigability and water power is prejudiced thereby.

In the instant case there is no intimation whatsoever of any prejudicial effect upon navigability or water power. Accordingly, the FPC has made no attempt to claim any involvement in the case. Neither is there any suggestion that the right-of-way here obtained is any interference with any federal plan. If anything, the contrary appears.

CONCLUSION

The decision below is correct, and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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